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No. 88-2009

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CORRECTED COPY

ALTHEUS RICHARDSON, *et al.*,
Petitioners

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioners contend that the common law of Texas imposes a duty on trade unions acting in their capacity as exclusive representatives pursuant to § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), to inform bargaining unit members before they exercise their right to strike under § 7 of the Act, 29 U.S.C. § 157, of certain rights which the NLRA has been construed to confer on employers in instances of economic as opposed to unfair labor practice strikes. They further contend that this duty is breached if a trade union negligently fails to do so. And they finally contend that this case was improperly removed from state court because the

federal duty of fair representation does not preempt state law from the regulation of trade unions in the performance of their duties as exclusive § 9(a) representatives with respect to the core NLRA function of conducting economic strikes.

Petitioners do not cite a single decision of either the Court or any Circuit that supports any of these three propositions. The omission is not accidental. Each is contrary to well-settled law of the Court as uniformly understood by the federal judiciary.[1] As we show below, the petition for writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners-Plaintiffs, 55 Phelps Dodge employees who were permanently replaced during an unsuccessful economic strike, commenced this action on April 6, 1987, in the District Court of El Paso County, Texas, with the filing of a petition against Respondent-Defendant United

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[1] While the federal courts are in complete agreement that, as a general principle, the federal duty of fair representation preempts the use of state law to define the standards of conduct for a union in its performance as exclusive bargaining representative under § 9(a), there is a conflict between the United States Courts of Appeals and the Idaho Supreme Court concerning the applicability of that principle to one discrete facet of a union's representational activities. As described in the petition of the Steelworkers in *United Steelworkers of America v. Rawson*, No. 89-322 (filed August 24, 1989), the Idaho Supreme Court has carved out an exception to the rule of preemption and has held that the federal duty of fair representation does *not* preempt state tort law that would hold a union liable for workplace injuries allegedly caused by its negligent administration and enforcement of the safety provisions of a collective bargaining agreement. For reasons stated in that petition for certiorari, the Idaho Supreme Court's decision merits review by this Court. The administration of a contract related to safety, however, is not at issue in the present case, and the precise conflict described in the *Rawson* petition does not undercut the unanimity of the federal courts on the question presented in this case.

Steelworkers of America, AFL-CIO-CLC. The petition alleged in relevant part: [2]

> "Between July 1, 1983, and April 5, 1985, *Defendant acted as bargaining agent for Plaintiffs* in connection with their employment by the Phelps Dodge Refinery in El Paso, Texas. *As the bargaining agent for Plaintiffs, Defendant had a duty* to advise them of measures which their employer could, and in reasonable probability would, take, should members of the bargaining unit (including Plaintiffs and others) either vote to reject their employer's final offer or vote to go out on strike. Among the employer's rights in this dispute was the right to put into effect its final offer after bargaining to impasse, and to hire permanent replacements in the event of a strike. Defendant, without legal justification or excuse, failed to advise plaintiffs that their employer had these rights. Thereafter, the employer exercised these rights, and all Plaintiffs were permanently replaced by the employer. Had Plaintiffs known that their employer had the rights which it in fact had, they would have either persuaded the other members of the bargaining unit to vote in favor of the employer's final offer, and if that had failed, then Plaintiffs would have accepted the final offer individually.
>
> . . . .
>
> The cause of action herein accrued on the 5th day of April, 1985, when Defendant informed Plaintiffs that Defendant no longer represented them. . . ." (App. 2-3, emphasis added by Court of Appeals).

The petition, which was silent as to whether Petitioners based their claim on federal or state law, was served on Respondent on May 6, 1987. (App. 3). Respondent removed the case pursuant to 28 U.S.C. § 1441 to the

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[2] A civil action is commenced in Texas by the filing of a petition, which pleading is the equivalent of a complaint. See: Tex.R.Civ. Proc. 22, "a civil suit in the District or County Court shall be commenced by a petition filed in the office of the clerk."

United States District Court for the Western District of Texas on May 20. (*Id.*).[3] On that same date, Respondent filed a motion to dismiss the complaint on the ground that Petitioners' action was a claim for breach of the federal duty of fair representation, which claim was time-barred under the six month limitations period of § 10(b) of the NLRA, 29 U.S.C. § 160(b).

On May 26, 1987, Petitioners filed both a motion to remand and a response to the motion to dismiss, arguing that their claim was for breach of a Texas common law duty of negligence and that such claim was entitled to either a two-year or four-year state limitations period. (App. 4). During the pendency of the respective motions to dismiss and remand, fourteen additional persons sought to intervene, asserting that their claims were identical to those of the original Petitioners-Plaintiffs. (*Id.*)

Thereafter, the District Court granted Respondent's motion to dismiss, holding that Petitioners' putative state claim was a time-barred federal claim for breach of the duty of fair representation, and denied both the motion to remand and the motion to intervene. (App. 4, 5).[4]

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[3] The original removal petition had stated that federal jurisdiction over the fair representation claim was conferred by § 301 of the Labor-Management Relations Act, as amended, 28 U.S.C. § 185. (App. 3). On May 29, 1987, Respondent moved to amend its petition for removal and tendered an amended petition alleging federal jurisdiction based on 29 U.S.C. § 159(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1337. (*Supra*, 4). The District Court granted leave to file the amended petition, noting that Respondent had timely moved within the thirty-day period provided by 28 U.S.C. § 1446(b). (*Id.*)

[4] Respondents' motion to dismiss was initially granted in an order of dismissal entered on October 13, 1987, which order did not explicitly rule on either the motion to remand or the motion to intervene. (App. at 5, fn.1). Subsequently, the District Court entered on November 7, 1987, an amended order of dismissal granting the motion to dismiss and denying the other two motions. (*Id.*)

On appeal, the Fifth Circuit affirmed in an opinion issued on February 6, 1989. (App. 1-19). The Court of Appeals began its analysis with the words of the petition itself, which explicitly pleaded that Respondent was the "bargaining agent" for Petitioners and that "as the bargaining agent for [Petitioners], [Respondent] had a duty to advise them" before they voted to reject the employer's final offer and engage in a strike that an employer had the right to both implement its final offer after bargaining to impasse and permanently replace economic strikers. (*Supra*, 5-6). These words, it recognized, implicated a single duty: the federal duty of fair representation, the sole duty placed on a trade union by virtue of its certification as exclusive bargaining agent pursuant to § 9(a) of the NLRA. (*Supra* at 6). And the Court of Appeals further realized:

> "In *Vaca v. Sipes*, 386 U.S. 171, . . . (1967), *the Court further held that this federal duty of fair representation preempted state substantive law* (though it did not preclude state court jurisdiction). *Id.* 87 S.Ct. at 916-18. As the Court stated: plaintiff's 'complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action.' *Id.* at 910. The Court explained that this uniform federal standard struck the proper balance between the union's need for discretion when acting as the representative of all the bargaining unit members and the individual's right to be treated fairly. *Id.* at 918. Because the plaintiffs in this case alleged that the Union breached a duty that arose from its status as their exclusive collective bargaining agent under the NLRA, *Vaca* requires that this duty be defined by the federal law. 'It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.' *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971). We

> thus find no error in the district court's characterization of plaintiffs' claims as NLRA duty of fair representation claims. *See Johnson v. Intern. Union Local No. 23*, 828 F.2d 961, 967 (3d Cir. 1987)." (Emphasis added, footnotes omitted).

This being so, the Circuit deemed Petitioners' state claim for common law negligence to be preempted by the federal duty of fair representation. (App. 9-10). It then held:

> "Because this is a duty of fair representation case, the six month limitations period of section 10(b) of the NLRA applies, *Delcostello* [*v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)], 103 S. Ct. 2281, and plaintiffs' claims, which were filed approximately two years after their claims arose, are therefore time-barred." (App. 10-11).

The Court of Appeals next took up the question of whether removal was proper under 28 U.S.C. § 1441.[5] Relying on its prior decisions in *In Re Carter*, 618 F.2d 1093 at 1104 (5th Cir., 1980), *cert. den.*, 450 U.S. 949 (1981); *Mumford v. Glover*, 503 F.2d 878 at 883 (5th Cir., 1974); and *Smith v. Local 25, Sheet Metal Workers International Association*, 500 F.2d 741 at 748 (5th Cir., 1974), the Circuit recognized that fair representation claims are implied from the grant of exclusive repre-

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[5] 28 U.S.C. § 1441 provides in pertinent part:

> "(a) . . . [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

sentation powers to unions by the NLRA, an Act of Congress regulating commerce. (App. 11-12). As such, they arise under 28 U.S.C. § 1337[6] and are removable pursuant to 28 U.S.C. § 1441.[7] (*Id.*) But the Circuit cautioned that neither this realization nor the bare proposition that the federal duty of fair representation preempts state duties of care necessarily meant that removal was proper here. This is because "under the well-pleaded complaint rule, federal preemption is generally a defensive issue that does not authorize removal of a case to federal court." (*Supra* at 13, citation omitted). The sole exceptions to this general rule are those rare instances where the preemptive power of the federal statute is so complete as to displace all state law, thus rendering any complaint, no matter its pleaded source of law, necessarily federal in nature. (*Supra* at 13-14).[8]

The prime example, the Circuit realized, of such complete displacement is § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, which was held in *Avco Corporation v. Aero Lodge No. 735, International Association of Machinists*, 390 U.S. 557 (1968), to completely preempt any state cause of action relating to a violation of a collective bargaining agreement. (App. 14). Relying on *Vaca* and *Avco*, the Court of Appeals then ascribed identical preemptive reach to the federal duty

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[6] 28 U.S.C. § 1337 provides in relevant part:

"(a) the District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."

[7] The Circuit further noted that removal would also have been proper under the broader grant of jurisdiction set forth in 28 U.S.C. § 1441, which encompasses "all civil actions arising under the Constitution, laws, or treaties of the United States."

[8] As we explain in our Argument, *infra* at 13, the state court petition, on its face, does indeed plead a federal claim and this analysis of the Court of Appeals was unnecessary to its ruling that removal was proper.

of fair representation as to state claims relating to the performance of trade unions as exclusive § 9(a) representatives:

> "We hold that where the NLRA federal law of fair representation, actionable in federal court, preempts a state law claim, the suit asserting such a claim arises under section 1337 and may be removed to federal court just as the suit asserting state law claims preempted by section 301 of the NLRA may be removed under 'Avco' and its progeny. 'Avco' recognized removal based on section 301's complete, displacing preemption of state law because of congressional intent that federal (and state) courts create and administer a comprehensive body of federal law for the court enforcement of collective bargaining agreements. *Under 'Vaca,' the NLRA duty of fair representation, for the enforcement of which a federal (and state) court action is authorized, completely preempts state law because of the congressional intent that federal law, developed to further the goal of the NLRA, entirely govern the duties which an NLRA collective bargaining representative owes, by virtue of its position as such, to the workers it represents in that capacity. We cannot conceive that Congress intended complete displacive preemption of the 'Avco' variety in the section 301 context, but not in the context of the duty of fair representation arising from a union's status as an exclusive collective bargaining agent under the NLRA."* (*Supra* at 17).

Under this rule, the Circuit concluded that the petition was properly removed since it pleaded that Respondent breached a duty owed to Petitioners by virtue of its position as their exclusive collective bargaining agent and that the only such duty is the federal duty of fair representation. (App. 17).[9]

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[9] The Circuit also denied the Petitioner-Intervenors' motion to intervene, explaining that intervention here was permissive rather

Following the issuance of the Circuit's opinion on February 6, 1989, Petitioners moved for rehearing. The motion was denied on March 8, 1989.

ARGUMENT

Petitioners are candid as to why they contend that a state duty of negligence survives the preemptive power of the federal duty of fair representation: they filed their lawsuit eighteen months too late under the teaching of *Delcostello*, and they cannot prove that Respondent's acts were arbitrary, discriminatory, or in bad faith as required by *Vaca*. These are not sufficient reasons for overturning settled federal labor law. And this law, as announced by the Court and applied by the Circuits, is uniformly in our favor as to both the preemption and removal points.

I. The Decision Of The Court Of Appeals Finding That The Federal Duty Of Fair Representation Completely Preempts And Displaces State Duties Of Care In The Regulation Of Trade Unions In The Performance Of Their Role As § 9(a) Representatives Is Consistent With Both The Decision Of The Court In 'Vaca' And The Precedent Of Other Circuits.

As the Court of Appeals recognized, the question of whether the federal duty of fair representation completely preempts and displaces state law as applied to a trade union's performance of its duties as exclusive collective bargaining representative is not an open one. It was asked and answered by the Court twenty-two years ago in *Vaca v. Sipes, supra.*

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than mandatory and that no "extraordinary circumstances" existed warranting the reversal of the District Court's "wholly discretionary" decision as to whether to allow permissive intervention. (App. 18-19). Petitioners cite no precedent in support of their argument that this decision was error. By failing to do so, they have waived this point, and we will not treat further with it in our Brief in Opposition.

In *Vaca*, as here, the petitioners contended that state common law negligence applied to trade unions performing their functions as exclusive bargaining agents. In reversing the Missouri Supreme Court, the Court held:

> "Although we conclude that state courts have jurisdiction in this type of case, *we hold that federal law governs, that the governing federal standards were not applied here*, and that the judgment of the Supreme Court of Missouri must accordingly be reversed." *Supra* at 174 (emphasis added).[10]

And that governing federal law, *Vaca* emphasized, was the duty of fair representation, which duty was created for the precise purpose of regulating union conduct undertaken pursuant to the NLRA's grant of exclusive representation status. *Supra* at 177. *Accord: Delcostello v. International Brotherhood of Teamsters*, *supra* at 164, f.14. As such, any claim that a union has acted wrongfully in its capacity as exclusive bargaining agent ". . . allege[s] a breach by the Union of a duty grounded in federal statutes, and . . . *federal law therefore governs [such] cause of action.*" *Vaca v. Sipes*, *supra* at 177, (emphasis added). In so holding, this Court made clear that the duty of fair representation preempted any and all state causes of action directed towards trade unions acting in their capacity as exclusive bargaining representatives.

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[10] In *Vaca*, the Court addressed two distinct preemption inquiries. The first was whether fair representation claims were subject to NLRA preemption because they fell within the exclusive jurisdiction of the National Labor Relations Board. It answered this question in the negative, holding that federal and state trial courts had concurrent jurisdiction over such claims. *Supra* at 176-183. The second was whether the federal duty of fair representation preempted state law from the regulation of trade unions acting as exclusive bargaining agents. The Court held that it did and that federal and state courts were to apply solely federal law. *Supra* at 174, 177.

Four years later, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), the Court reiterated the *Vaca* holding, insisting that a state court hearing an action against a union for allegedly wrongful action taken in its capacity as exclusive bargaining agent was to apply federal not state law and was to impose liability only if the union breached its federal duty of fair representation:

> "[F]or such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith on the part of the Union, 'Vaca v. Sipes,' *supra* at 193. . . . There must be substantial evidence of fraud, deceitful action or dishonest conduct. 'Humphrey v. Moore,' *supra*, 374 U.S. at 348. . . . *Whether these requisite elements have been proved is a matter of federal law.*" *Supra* at 299 (emphasis added, unofficial citations omitted).

These words of the Court in *Vaca* and *Lockridge* could not be plainer. They were followed here by the Fifth Circuit, and they have been followed by every other Court of Appeals which has taken up the issue of whether the federal duty of fair representation completely preempts and displaces state law from the regulation of unions in the performance of their duties as exclusive agents. *See, e.g., Jones v. Truck Drivers Local Union 299*, 838 F.2d 856 at 860-61 (6th Cir., 1988); *Johnson v. United Food & Commercial Workers Local 23*, 828 F.2d 961 at 967 (3d Cir., 1987); *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 at 735-36 (6th Cir., 1985); *Peterson v. Air Line Pilots Association*, 759 F.2d 1161 at 1168-70 (4th Cir., 1985), *cert. den.*, 474 U.S. 946 (1985).[11] In short,

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[11] The duty of fair representation in *Peterson* arose under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, rather than the NLRA. As *Peterson*, noted, *supra* at 1169-71, the distinction is immaterial since the two statutes are interpreted identically on the question of whether the federal duty of fair representation wholly preempts state duties of care.

on the question of preemption,[12] the law is clear, uniform, and wholly against Petitioners.[13]

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[12] Petitioners, as they did below, argue that preemption here cannot be premised on *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), or *International Brotherhood of Electrical Workers v. Hechler*, —— U.S. ——, 107 S.Ct. 2161 (1987), because their claim against the Union does not ". . . require analysis or interpretation of a collective bargaining agreement." (Petition For Writ Of Certiorari at 7). We agree completely, but the point is irrelevant. The controlling question here is not the preemptive scope of § 301, as in *Allis-Chalmers* and *Hechler*, but rather the preemptive reach of the duty of fair representation, which exists independent of § 301. *See, Storey v. Local 327, International Brotherhood of Teamsters*, 759 F.2d 517 at 523-234 (6th Cir., 1985); *Sinyard v. Foote & Davies Division of McCall Corporation*, 577 F.2d 943 at 947 (5th Cir., 1978). And the answer to that second inquiry is provided by *Vaca* and *Lockridge*.

[13] In characterizing Petitioners' claim as one for breach of the duty of fair representation, the Circuit, while expressing no view on the merits, relied on *Swatts v. United Steelworkers of America*, 808 F.2d 1221 (7th Cir., 1986). (App. 5-6, 7, f.5). There, the plaintiffs pleaded a claim identical to that alleged at bar: that the union had a duty to warn economic strikers that they could be permanently replaced by their employer. This failure, the plaintiffs alleged, breached the duty of fair representation. The Seventh Circuit rejected this claim out of hand, stating, "the crux of plaintiffs' complaint concerns the union's failure to give them information that was readily available to any member of the general public —that strikers sometimes lose their jobs because employers find replacements to fill their slots." *Supra* at 1224-25. Failure to provide such information, the Circuit held, did not not violate the duty of fair representation, which could be breached only by intentional, invidious, affirmative misstatements. *Supra* at 1225. To hold otherwise, the Circuit insisted, ". . . would have a chilling effect on the right to strike itself by instilling a fear of unjustifiable lawsuits." *Id.*

II. Removal Was Proper Here Because The Petition, On Its Face, Pleaded A Claim For Breach Of The Federal Duty Of Fair Representation, And Even If It Did Not, Removal Would Still Be Proper Because The Duty Of Fair Representation Has Wholly Preempted And Displaced State Law From The Regulation Of Unions In The Performance Of Their Duties As Exclusive Collective Bargaining Agents.

Petitioners' state court pleading mentioned neither negligence nor the common law of Texas.[14] Rather, without identifying any statutory or jurisdictional basis for their claim, Petitioners simply pleaded that "*as bargaining agent* for [Petitioners], [Respondent] *had a duty* to advise them" before they voted to go on strike that their employer had the right to both implement its final offer after bargaining to impasse and to permanently replace economic strikers. (App. 2-3, emphasis added). As such, the state court petition, on its face, pleaded a federal claim because we know in the wake of *Vaca* that the only duty ascribed to a union acting in its capacity as exclusive bargaining agent is the federal duty of fair representation. This being so, removal here was proper without more, and there is no need to take up, as did the Court of Appeals, the hypothetical question of whether removal would also be proper if Petitioners had explicitly relied solely on state law in their state court pleading.

But if they had, the outcome here would be the same: removal would be warranted because instances of complete preemption, such as that announced in *Vaca* with respect to the duty of fair representation, are outside the ambit of the well-pleaded complaint rule. This is because "one corollary of the well-pleaded complaint rule . . . is that Congress may so completely preempt a particular area, that any civil complaint raising this select group

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[14] Petitioners first raised their contention that their claim was for Texas common law negligence in their motion to remand and response to Respondents' motion to dismiss. (App. 4).

of claims is necessarily federal in character." *Metropolitan Life Insurance Company v. Taylor*, —— U.S. ——, 107 S.Ct. 1542 at 1546 (1987). Such necessarily federal claims, in turn, are exempt from the general understanding that the defense of federal preemption does not authorize removal because such defense ordinarily does not appear on the face of a well-pleaded state complaint. *Id.* One example of such necessarily federal claims are those grounded in § 301, and "for 20 years, this Court has singled out claims preempted by § 301 . . . for such special treatment. *Avco Corporation v. Machinists*, 390 U.S. 557 . . . (1968)." *Id.*

The rationale for *Avco* was explained by the Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 at 23-24 (1983), (emphasis added, footnote omitted):

> ". . . the necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *'Avco' stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.*"

As the Court of Appeals correctly recognized, relying on *Vaca* and *Lockridge*, the preemptive power of the federal duty of fair representation is as sweeping as that of § 301, wholly displacing state regulation of trade unions in the performance of their duties as exclusive bargaining agents. *Accord: Jones v. Truck Drivers Local Union 299, supra; Johnson v. United Food & Commercial Workers Local 23, supra; Maynard v. Revere Copper Products, Inc., supra; Peterson v. Air Line Pilots Asso-*

ciation, supra. (App. 16). This realization triggers the applicability of *Avco* and renders the removal here proper even if we wrongly assume Petitioners' well-pleaded complaint explicitly and solely invoked state law as the basis of their claim. *Accord: Reiss v. Brotherhood of Railway & Airline Clerks*, 629 F. Supp. 1029 at 1030 (E.P. Pa., 1986).

This realization ends the matter, but we further note that Congressional intent would be thwarted in two major respects if the duty of fair representation were not given the same preemptive reach as § 301. First, Congress, in § 9(a) of the NLRA, established a federal scheme of exclusivity, the purpose of which was to reduce industrial strife by investing unions with the power of exclusive representation, which power was to be exercised in conformance with a single federal duty, the duty of fair representation. Ascribing less than total preemptive power to that federal duty revives the possibility that trade unions would be liable for simple negligence, a result directly at odds with this Court's insistence in *Vaca* that only arbitrary, discriminatory and bad faith conduct are actionable because any higher standard of care would erode unions' crucial discretion to compromise differences with the employer and balance competing interests within the bargaining unit, thereby defeating the overarching objective of the NLRA, industrial peace. *See also, Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). Second, Congress, in enacting the six-month limitations period of § 10(b) of the NLRA, made clear its insistence that labor disputes be promptly resolved. *See: Delcostello v. International Brotherhood of Teamsters*,[15] *supra.* It is this statute of limitations which all parties concede controls the fair representation claim here, and it is the Congressional policy embedded therein which Petitioners

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[15] *Delcostello* offers an additional ground for granting the duty of fair representation the same preemptive scope as § 301: claims for breach of the duty and breach of a collective bargaining agreement are often entwined in a single hybrid action. *Supra* at 164-65.

seek to defeat by arguing that they are entitled to state limitations periods four to eight times as long. That Petitioners seize upon these two *divergences* from Congressional intent as grounds for granting the writ of certiorari is the best proof of the wrongness of their arguments.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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